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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/631,279	07/31/2003	Keith A. Raniere	FIRS-2992	3766

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SCHMEISER, OLSEN & WATTS
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LATHAM, NY 12110

EXAMINER

UTAMA, ROBERT J

ART UNIT	PAPER NUMBER
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3714

SHORTENED STATUTORY PERIOD OF RESPONSE	MAIL DATE	DELIVERY MODE
3 MONTHS	04/25/2007	PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

If NO period for reply is specified above, the maximum statutory period will apply and will expire 6 MONTHS from the mailing date of this communication.

Office Action Summary

Application No.

10/631,279

Applicant(s)

RANIERE, KEITH A.

Examiner

Robert J. Utama

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 14 March 2007.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1 and 4-33 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1, 4-8, 17-20 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO/SB/08)
Paper No(s)/Mail Date _____.
- 4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date _____.
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: _____.

DETAILED ACTION

1. In response to the amendment filed on 03/14/2007, claims 1 and 4-33 are pending, claims 9-16 and 21-33 are withdrawn. Claims 2-3 have been cancelled.

Claim Rejections - 35 USC § 112

2. The following is a quotation of the first paragraph of 35 U.S.C. 112:

The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same and shall set forth the best mode contemplated by the inventor of carrying out his invention.

3. **Claims 1-8 are rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the enablement requirement.**

The claim(s) contains subject matter, which was not described in the specification in such a way as to enable one skilled in the art to which it pertains, or with which it is most nearly connected, to make and/or use the invention. Claim 1 is directed toward "*determining if a subject is trainable with respect to the performance of a given activity*". The limitation of "determining" implies that a finite step-by-step procedure needs to be established in order to reach a determination or a decision. The specification fails to provide distinct criteria that need to be assessed in order to arrive at such decision.

Claims 4-8 are also rejected under 35 U.S.C. 112 first paragraph since these claims is dependent upon claim 1.

4. **Claim 8 is rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the enablement requirement.**

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The claim(s) contains subject matter, which was not described in the specification in such a way as to enable one skilled in the art to which it pertains, or with which it is most nearly connected, to make and/or use the invention. Claim 8 is directed toward training with respect to inanimate objects of computer program and data. The specification recites that this step is enabled for an adaptive computer program by finding a "resonance point" of the system. The specification fails to provide how the determination of such "resonance point" can be reached.

Claim Rejections - 35 USC § 102

5. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

6. Claim 1, 4-8, 17-20 rejected under 35 U.S.C. 102(b) as being anticipated by Stratton et al.

Claim 1: Stratton et al discloses a method of exercising a given subject by subjecting the individual to an exercise machine at a given speed setting and slowly increasing at the speed of the exercise machine until exhaustion sets in (see Stratton page 1649 under the heading "Study Protocol"). The examiner contends that during the exercise the heart rate and blood pressure will always be at a point of efficiency and by slowly changing the speed of the machines the subject are at a constant state of accommodation. A subject is not in state in accommodation only when the exhaustion sets in and the subject is unable to keep up with the workload given by the supine

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exercise machine. Stratton also provided a method to see if a subject is trainable with respect of the research activity (see Stratton Abstract).

Claim 4 and 18: Stratton teaches that one of the parameter used in the study is one of physical parameter, such as heart rate and blood pressure (see Stratton page 1649 under the heading “Data Collection and Processing”).

Claim 5 and 19: Stratton teaches that one of the physical parameter selected is the subject blood pressure (see Stratton page 1649 under the heading “Data Collection and Processing”).

Claim 6 and 20: Stratton teaches that one of the physical parameter selected is the subject heart rate (see Stratton page 1649 under the heading “Data Collection and Processing”).

Claim 7: Stratton teaches that one of the observed in the study is derived from physical motion (see Radio Ventriculogram page 1649 under the heading “Data Collection and Processing”).

Claim 8: Stratton teaches of a training method selected from a group of human (see Stratton Abstract).

Claim 17: Stratton teaches of providing a performance system (a supine exercise machine) and activating it [see Stratton Abstract]. Recording the parameter of the performance system (see kpm in Abstract and FIG. 1 and 2). Measuring the physical parameter of the subject (see Stratton page 1649 under the heading “Data Collection and Processing”). Stratton et al discloses a method of exercising a given subject by subjecting the individual to an exercise machine at a given speed setting and slowly increasing at the speed of the exercise machine until exhaustion sets in (see Stratton page 1649 under the heading “Study Protocol”). The examiner contends that during

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the exercise the heart rate and blood pressure will always be at a point of efficiency and by slowly changing the speed of the machines the subject are at a constant state of accommodation. A subject is not in state in accommodation only when the exhaustion sets in and the subject is unable to keep up with the workload given by the supine exercise machine. Stratton also provides a teaching that the training resulting an increase of cardiac output by the training subject (see page 1653 "cardiac peak index" and Abstract).

Response to Arguments

7. The affidavit filed on 3/14/2007 under 37 CFR 1.131 is effective to overcome the rejection in view of Hervert referee.
8. Applicant's arguments with respect to claim 1, 4-8, and 17-20 have been considered but are moot in view of the new ground(s) of rejection.
9. With respect to the applicant's argument on the rejection of claim 1 and 4-8 under the statute 35 U.S.C 112, first paragraph as failing to comply with the enablement requirement. The examiner raised this rejection due to the ambiguities created by the limitations of "determining if a subject is trainable with respect to the performance of a given activity". The examiner interprets this limitation as an act, which classify whether a subject is trainable. Hence, it would logically follows that if the subject is determined to be not trainable, then the subject would not exposed to the proposed training method disclose by the applicant. The applicant asserted that one could determine a subject is trainable by observing if the subject is affected by training. Hence, a subject will always need to be exposed to the proposed training process at the very least to determine if such subject is trainable. With this in mind,

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the examiners asserts that the applicant fails to provide enabling disclosure that would allow one of skilled in the art to identify or understand the limitation of "determining if a subject is trainable with respect to the performance of a given activity".

10. With respect to the applicant's argument on the rejection of claim 8 under the statute 35 U.S.C 112, first paragraph as failing to comply with the enablement requirement. The applicant's argument seems to be directed towards providing enablement information for training an animate object such as human and microbe. However, the examiner takes the position that data and computer program are very different in term of biological adaptation function, especially since data and computer program do not normally possess this function. The applicant's disclosure also fails to provide metric that can be used to measure the input and output relationship of a data or computer program for one skilled in the art to be able to find or understand this "resonance point". A point where the maximum output can be expected when a minimum input is applied to a computer program or data. Hence, the rejection under 35 U.S.C 112, first paragraph on claim 8 is still in effect.

11. Applicant's arguments with respect to claim 1, 4-8 and 17-20 have been considered but are moot in view of the new ground(s) of rejection.

Conclusion

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Robert J. Utama whose telephone number is (571) 272-1676. The examiner can normally be reached on M-F 9:00-5:30.

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If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Robert Pezutto can be reached on (571)272-6996. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

RU


KATHLEEN MOSSER
PRIMARY EXAMINER